



Comptroller General
of the United States

Washington, D.C. 20548

147385

Decision

Matter of: Valley Construction Company

File: B-247461.2

Date: August 6, 1992

Ivor J. Longo, Esq., and George Papaioanou, Esq., Smith, Currie & Hancock, for the protester.
Lester Edelman, Esq., Corps of Engineers, for the agency.
John M. Melody, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined that awardee's bid under competitive 8(a) set-aside represents a fair market price where, although the 8(a) bid is 16 to 17 percent higher than the estimate, that difference is within the 25 percent differential generally permitted under 33 U.S.C. § 624 (1988), and the bid is lower than the other 8(a) bids received by approximately the same amount by which it exceeds the estimate.

DECISION

Valley Construction Company protests the award of any contract under invitation for bids (IFB) No. DACW01-91-B-0192, issued by the Army Corps of Engineers as a competitive set-aside under the Small Business Administration's (SBA) section 8(a) program.¹ Valley maintains that the agency improperly concluded that the low bid represents a fair market price (FMP).

We deny the protest.

The IFB contemplated the award of a fixed-price contract for construction of the Plymouth Bluff Nature and Cultural Study Center at Aliceville Lake, Alabama. Of 22 prospective 8(a)

¹Section 8(a) of the Small Business Act authorizes SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a) (1988 and Supp. II 1990).

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firms on a list provided to the Corps by SBA, 3 submitted bids in response to the IFB. They were as follows:

Contex Construction Co., Inc.	\$3,705,336
Shah Construction Co., Inc.	4,210,000
E.R. Mitchell Construction Co., Inc.	4,361,972
Government Estimate	2,973,533

Valley is a small business not eligible under the section 8(a) program, and did not submit a bid. Although Contex's bid was approximately 24.6 percent higher than the government estimate, the Corps determined that the price was fair and reasonable. SBA confirmed to the Corps that Contex was eligible for award as an 8(a) concern, and the Corps was prepared to proceed with the award to Contex at the time Valley filed this protest. The award has been delayed pending our decision.

Valley maintains that Contex's low bid does not satisfy the requirement that award under the 8(a) program be at an FMP, 15 U.S.C. § 637(a)(1)(A) (1988), that award therefore cannot properly be made under this IFB, and that the requirement instead should be resolicited for all small businesses, without the 8(a) restriction. Valley asserts that the Corps' conclusion that Contex's price was an FMP notwithstanding that it exceeded the estimate by 24.6 percent was based on an inadequate price analysis. Valley claims it could perform the project for \$3,385,000 (or less), an amount almost 10 percent lower than Contex's bid, and that this fact demonstrates that Contex's bid does not represent an FMP.

An agency may not award an 8(a) contract if the price of the contract would result in a cost to the government which exceeds an FMP. Federal Acquisition Regulation (FAR) § 19.806(b). FMP is defined under FAR § 19.001 as "a price based on reasonable costs under normal competitive conditions and not on the lowest possible cost." The procedures for estimating the FMP in 8(a) procurements are set forth in 15 U.S.C. § 637(a)(3)(B) and FAR § 19.807. These provisions require agencies to derive an FMP from a price or cost analysis that may take into account commercial prices for similar services, available in-house cost estimates, cost or pricing data submitted by SBA, and information obtained from any other government agency. Under FAR § 15.805-2, "Price Analysis," the agency also may use one or more of several listed price analysis methods, including comparing the prices received in response to the solicitation, and comparison of the prices received with a government estimate. We will not question an agency's FMP determination unless it is not reasonably based or there is a showing of fraud or bad faith on the part of agency

officials, Government Contracting Resources, B-243915, Aug. 15, 1991, 91-2 CPD ¶ 153.

The Corps' FMP determination was based on two price analysis techniques: comparison of the bids received and comparison with the government estimate. The determination also took into consideration three other factors: (1) the estimate did not include profit, estimated at 7 to 8 percent, so Contex's bid actually was considered to be 16 to 17 percent, not 24.6 percent, above the estimate; (2) 8(a) bids historically require payment of a price premium; and (3) since the bid price exceeded the estimate by less than 25 percent, the award was permissible under 33 U.S.C. § 624, which prohibits the award of civil works project contracts at prices more than 25 percent above the government estimate.

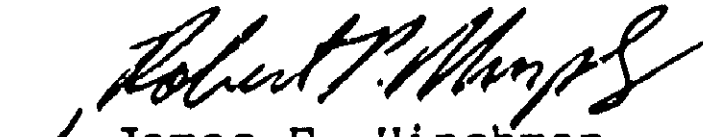
We find that the Corps' FMP determination was reasonable. Although Contex's price exceeded the estimate by 16 to 17 percent (when a 7 to 8 percent profit is added to the estimate), the other comparisons relied upon by the agency in its price analysis indicated that the price nevertheless was an FMP.² First, the price was well within the 25 percent differential permitted to be paid under 33 U.S.C. § 624. While this may not by itself have supported the agency's FMP determination, we think it was a proper factor for the agency to consider, since that provision is aimed at assuring price reasonableness in Corps procurements generally.

Second, Contex's price was approximately as far below the other 8(a) bids--13.6 percent below the second low and 17.7 percent below the third low bids--as it was above the estimate. Since comparisons with the estimate and the other bids received both are acceptable price analysis methods for determining an FMP, we think the fact that a bid falls midway between the two reasonably can be viewed as suggesting that the price is an FMP. In this regard, we think it is implicit in the fact that agencies may rely on more than one price analysis method that different results may be obtained in certain cases. When this happens, it is up to the agency to rectify apparently disparate results or determine that one result is more accurate. Here, since Contex's price fell between the estimate and the other bids, and the agency did not consider either comparison less valid than the other, the agency reasonably could conclude that

²We have recognized that 8(a) and other set-aside awards, by their nature, may necessitate payment of some premium above the price of an unrestricted award. See Government Contracting Resources, supra.

the results of the two comparisons considered together
(along with the consistency of the price with 33 U.S.C. §
624) evidenced an FMP.

The protest is denied.


James F. Hinchman
General Counsel